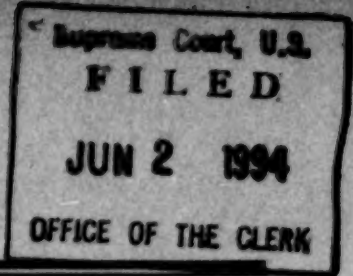


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No. 93-986



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARGARET MCINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

**MOTION TO SUBSTITUTE EXECUTOR JOSEPH
MCINTYRE AS THE PROPER PARTY IN THIS CASE**

**MEMORANDUM IN SUPPORT OF MOTION TO
SUBSTITUTE EXECUTOR AND IN OPPOSITION
TO THE OHIO ELECTIONS COMMISSION'S
MOTION TO DISMISS THE CASE**

George Q. Vaile
776 County Road 24
Marengo, Ohio 43324
(614) 747-2218

David Goldberger
Counsel for Petitioner
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821
Counsel for Petitioner

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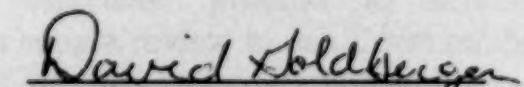
OHIO ELECTIONS COMMISSION,

Respondent.

**MOTION TO SUBSTITUTE EXECUTOR
JOSEPH MCINTYRE AS THE PROPER
PARTY IN THIS CASE**

Joseph McIntyre, executor of the estate of Defendant-Petitioner Margaret McIntyre, hereby moves this Court for an order substituting him as the Defendant-Petitioner in the above entitled case. This motion is made pursuant to Rule 35.1 of this Court because Margaret McIntyre died on or about May 6, 1994, and the Probate Court of Franklin County appointed Joseph McIntyre as executor on May 20, 1994.

Respectfully submitted,


David Goldberger 0010292
Counsel for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
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MARGARET McINTYRE,

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v.

OHIO ELECTIONS COMMISSION,

Respondent.

**MEMORANDUM IN SUPPORT OF MOTION TO
SUBSTITUTE EXECUTOR AND IN OPPOSITION
TO THE OHIO ELECTIONS COMMISSION'S
MOTION TO DISMISS THE CASE**

I. BACKGROUND OF THIS MOTION

On February 22, 1994, this Court granted Margaret McIntyre's petition for certiorari to review the constitutionality of Section 3599.09 of the Ohio Election Code, which prohibits distribution of political campaign leaflets that do not contain the name and address of the leafletter. Mrs. McIntyre had previously been fined \$100 by the Ohio Elections Commission for distributing a leaflet opposing passage of a referendum proposal to increase property taxes. Petitioner sought review in this Court on the ground that the decision of the Ohio Supreme Court sustaining

her fine under Section 3599.09 was inconsistent with this Court's decision in *Talley v. California* 362 U.S. 60 (1960). Margaret McIntyre died on May 6, 1994.

Joseph McIntyre, the executor of Margaret McIntyre's estate, makes his motion to substitute as the party in this case pursuant to Rule 35.1 of this Court which provides that: "In the event a party dies after filing a notice of appeal to this Court, or after filing a petition for writ of certiorari, the authorized representative of the deceased party may appear and, upon motion, be substituted as a party to this proceeding." Movant is the duly appointed executor of the estate of Margaret McIntyre. He was appointed following the death of Mrs. McIntyre. (Ex.A) A motion to substitute him as the proper party in this case pursuant to Rule 25 of the Ohio Rules of Civil Procedure is currently pending before the trial court.¹

The executor's motion should be granted because, on December 9, 1994, a final civil judgment in this case was entered against Petitioner Margaret McIntyre fining her \$100 plus court costs for distributing a political leaflet that did not contain her name and address. (J.A.53) The judgment, which was entered pursuant to the mandate of the Ohio Supreme Court upholding the constitutionality of section 3599.09, was then stayed pending the outcome of proceedings in this Court. (J.A.55) The December 9th judgment imposed a civil debt comprised of both the fine and the court costs. Absent the current stay, the debt would be collectable from Petitioner's estate.

1. A ruling is expected shortly. Counsel for Petitioner and Petitioner's executor will inform this Court of the disposition of the motion to substitute below as soon as the Franklin County Court of Common Pleas rules.

II. THE MOTION TO DISMISS THIS CASE SHOULD BE DENIED

Notwithstanding the fact that the fine and court costs have created a civil debt payable by the Petitioner's estate, the Ohio Elections Commission now makes a unilateral attempt to moot this case on the ground that the Commission has now chosen not to collect the fine. According to its motion, the Commission asserts that this case is now moot because the Commission intends to make "no further attempts . . . either to pursue this case or to collect the fine imposed." (Resp. Motion to Dismiss p. 2.)

In making its motion to dismiss this appeal, the Commission relies solely on its unilateral choice not to collect the fine made after the petition for certiorari in this case had been granted. The Commission makes no claim that the civil fine abates on the death of a party. Indeed, on May 24, 1994, during argument in the Franklin Court of Common Pleas, the Commission explicitly stated that it was not asserting that the fine abated because of the Petitioner's death. Instead it asserted that the case was moot because of the Commission's unilateral choice not to collect it:

Mr. Sutter: . . . We also argue, your honor, that the case became moot. This is a circumstance where Margaret McIntyre has died. It was a fine imposed against her for her conduct. There is no longer an outstanding fine.

Mr. Goldberger: Is it the State's position, so I'm clear, that all civil fines abate on the death of a party?

Mr. Sutter: No. It is not. We are not even suggesting that. What we are suggesting is that

under these circumstances, in light of the amount involved, in light of the circumstances, that the Ohio Elections Commission decided that it did not want to pursue the fine. (Ex. B)

The Commission's mootness contention is mistaken. It does not have the power to moot a case unilaterally by refusing to collect the civil fine that remains enforceable pursuant to a valid civil judgment. A controversy remains between the parties because of that judgment and because of the collateral consequence that the judgment also obligates Petitioner's estate to pay court costs.²

Indeed, there is no legal barrier prohibiting the Commission from changing its mind and collecting the fine. Thus, to the extent that the fine has been imposed pursuant to an unconstitutional statute, the discretionary refusal to collect it is nothing more than a temporary cessation of the unlawful enforcement of an unconstitutional statute in order to avoid the risk of an unfavorable ruling by this Court. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1951).

In addition, even if the Commission honors its exercise of unilateral discretion and never collects the fine, under Ohio law, Petitioner's estate must pay the court costs. *Ohio v. McGettrick*, 31 Ohio St. 3d 138, 141 n.4, 509 N.E. 2d 378, 381 n.4 (1987). See also *Wetzel v. Ohio*, 371 U.S. 62 (1962) (Douglas, J., concurring). The Commission's decision to forego collection of the fine does not abate the final judgment entered in this case and, therefore, has no effect on the liability of Petitioner's estate for court costs imposed pursuant to a valid and unabated judgment. *Ohio v. McGettrick*; *supra*. Such costs remain a collateral

consequence of the final judgment that has been entered below. See *Sibron v. New York*, 392 U.S. 40, 57 (1968). Under such circumstances, proceedings in this Court do not abate. This was recognized in *Wetzel v. Ohio*, 371 U.S. 62 (1962), in which this Court refused to dismiss an appeal from the Ohio courts because the defendant in that case had died. In *Wetzel*, following the defendant's death, this Court substituted the administrator of a deceased criminal defendant's estate as the party in that case.³

The obligation to pay court costs is unaffected by the Commission's unilateral decision not to collect the fine in this case because the costs are payable to the state courts. The judgment against the Petitioner will remain in effect unless reversed by this Court, and Petitioner's estate will remain liable for costs. Therefore, because costs have been imposed pursuant to a judgment with ongoing validity, they constitute the very collateral consequences that defeat any claim of mootness. *Sibron v. New York*, *supra*. In short, unlike the fine, the costs are not waivable by the Commission.

To grant the Commission's motion to dismiss this case would establish the principle that the government has uncontrolled discretion to moot a case pending before this Court any time that it unilaterally chooses to waive enforcement of a judgment in its favor. This would be true whether or not the party died. According to the Commission, the waiver of the fine rather than the death of the Petitioner moots this case. Such unfettered discretion would be most likely to be exercised whenever a government lawyer concluded that the state had a weak case.

Indeed, if the Commission in this case can succeed in mooting this case by choosing not to collect the \$100 fine, it remains free to enforce or to threaten enforcement of its

2. In fact, prior to her death, Petitioner established a trust which provided for the payment of the fine in the event of her death, if there were an unfavorable outcome in this Court.

3. The appeal was dismissed on the merits for want of a substantial federal question.

constitutionally suspect statute in future cases. Loss of a \$100 fine is a small price for the Commission to pay in order to protect itself against the possibility that this Court may invalidate the statute at issue in this case.

Moreover, it is clear that, under Ohio law, Petitioner's death does not moot or abate this case. In *Ohio v. McGettrick*, 31 Ohio St.3d 138, 509 N.E.2d 378 (1987), the Ohio Supreme Court held that a criminal appeal survives the death of the Defendant-Appellant. There it stated:

When a criminal defendant-appellant dies while his appeal is pending and, subsequently, within a reasonable time, a personal representative of the decedent is appointed, that representative may be substituted as a party on motion by the decedent's representative or the state under the then existing style of the case and the court of appeals shall proceed to determine the appeal.

31 Ohio St.3d at 138. Similarly, in *Porter v. Lerch*, 127 Ohio St. 47, 193 N.E. 766 (1934), the Ohio Supreme Court held that civil actions survive the death of a party, particularly after entry of a final judgment creating a civilly enforceable obligation. See also *Wetzel v. Ohio*, 371 U.S. 62 (1962).

Because Ohio law does not moot or abate this appeal, a decision by this Court granting the Commission's motion to dismiss would strip the Petitioner's executor of any defense against any future effort to collect the fine or the costs, even though the judgment appears to be based on an unconstitutional statute.

III. CONCLUSION

For the foregoing reasons, the executor of Petitioner's estate requests (1) that this Court grant his motion to substitute as

the party in this case and (2) that this Court deny the Ohio Elections Commission motion to dismiss this case.

Respectfully submitted,

David Goldberg
David Goldberg 0010292
Counsel for Petitioner
The Ohio State University
College of Law
Clinical Programs
55 West 12th Avenue
Columbus, Ohio 43210
(614) 292-6821

George Q. Vaile
776 County Road 24
Marengo, Ohio 43324
(614) 747-2218